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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

The Morning Pioneer, Inc.,

Petitioner.

-vs-

The Bismarck Tribune Company,
A Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRUCE B. BAIR
210 1st Avenue NW-Box 100
Mandan, North Dakota 58554

Attorney for Petitioner

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals below, in The Morning Pioneer, Inc. v. The Bismarck Tribune Company, a Corporation, its No. 73-1036, is not yet reported and is appended at page 15 hereof.

The opinion of the District Court of North Dakota below, in The Morning Pioneer, Inc. v. The Bismarck Tribune Co., a corporation, its Civil No. 996, is reported at 342 F.Supp. 1138 (1972).

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was filed March 12, 1974, affirming the decision of the lower court.

Jurisdiction in the Supreme Court is based upon 28 USC 1254, subd. 1.

QUESTIONS FOR REVIEW

I. In finding no Robinson-Patman Act violation the Court of Appeals and the Trial Court decided an important Federal question in conflict with applicable decisions of the Supreme Court.

II. In finding no damages for a Robinson-Patman Act violation the Court of Appeals applied the wrong standard and disregarded an applicable decision of this Court.

III. For the same reasons stated in II. above, the Court of Appeals erred in finding no damages proved for violations of the Sherman Act.

IV. The Court of Appeals erred in holding that the trial court's "implicit holding" that the admitted price discrimination was not violative of the Sherman Act was

justified because "the pricing practice was one of over thirty years standing".

V. The determination of the lower courts that the Pioneer was entitled to only nominal damages on the Sherman Act violation and proved no damages on the Robinson-Patman Act count disregarded facts clearly proved.

STATUTES INVOLVED

15 U.S.C. § 2

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

15 U.S.C. § 13 (a)

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to

create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: PROVIDED, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: PROVIDED, HOWEVER, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: AND PROVIDED FURTHER, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: AND PROVIDED FURTHER, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

15 U.S.C. § 13 (b)

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: PROVIDED, HOWEVER, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

15 U.S.C. § 13a

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

15 U.S.C. § 15

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 26

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: PROVIDED, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to

the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

STATEMENT OF THE CASE

The Morning Pioneer, a daily newspaper published in Mandan, North Dakota, sued the Bismarck Tribune, published daily in Bismarck, North Dakota, (five miles away) for violations of the Robinson-Patman Act and the Sherman Act. The principal contention was that the admitted price discrimination in sales of the Tribune in Mandan at a lower price than in Bismarck was a prima facie violation of the Robinson-Patman Act and that the Tribune failed to sustain its burden of showing any justification for the admitted price discrimination. The District Court found against the Pioneer on grounds which the Court of Appeals found erroneous. But the Court of Appeals sustained the decision anyway, holding that the Pioneer had not proved damages (thereby ignoring its right to at least nominal damages, and going contra to a long series of decisions in this Court).

The secondary issue (which both courts treated with more attention than the major one) was whether the Tribune violated the Sherman Act by predatory acts of blanketing the city of Mandan with free Tribunes immediately after the Pioneer changed hands, cutting advertising rates to Mandan merchants, and other acts. The trial court found that the Tribune violated the Sherman Act by the blanketing, but not by the other acts. It then found that the Pioneer had not proved its damages from the blanketing as a separate item, and allowed only nominal damages. Again, the Court of Appeals found that the trial court erred in its rule as to damages, but affirmed nevertheless be-

cause the Pioneer had, it said, not proved its damages.

We concede that the determination of non-violation of the Sherman Act, except for the blanketing, is a finding based on disputed facts, and we do not appeal from that determination. We likewise accept the finding that the Sherman Act was violated by the blanketing. But we assert that the courts below erred in holding the Pioneer to proof (in the trial court) of damages from the specific act (blanketing) found to be violative and (in the Appellate Court) holding that damages had not been proved.

This is a case of great importance to the future administration of the antitrust laws of the United States. If this decision is allowed to stand, it constitutes a reversal of the holding of all of the decisions cited herein to the effect that a price discrimination under Robinson-Patman is a price difference and a per se, prima facie violation of the Robinson-Patman Act. It will also constitute a determination by the Eighth Circuit that the use by the District Court of an erroneous standard of proof and an erroneous measure of damages raises only a question of fact entitled to be upheld unless clearly erroneous, and will thereby constitute a reversal of the holding of United States vs. Singer Manufacturing Company, supra, that an erroneous interpretation of the standard to be applied is a question of law.

ARGUMENT

I. IN FINDING NO ROBINSON-PATMAN ACT VIOLATION THE COURT OF APPEALS AND THE TRIAL COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

The Court of Appeals found that the Trial Court used the wrong test for determining whether the

Robinson-Patman Act was violated, but failed to reverse the lower court. In so doing, the Court of Appeals erred.

It is undisputed, in fact it is agreed, that the Bismarck Tribune during practically the entire time in question was sold to subscribers in Mandan for 5¢ to 10¢ per week less than in Bismarck, where the Tribune is published. The Court of Appeals so found, and the parties so stipulated. See Note 9 and first sentence of Note 10 of Court of Appeals Opinion.

All of the applicable precedents hold that a price discrimination is established under Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act (15 USC 13 (a)), hereinafter described as "Robinson-Patman", merely by showing a territorial price differential. Federal Trade Commission vs. Anheuser-Busch, Inc., 363 US 536, 4 L.Ed.2d 1385, 80 S.Ct. 1267; Moore vs. Mead's Fine Bread Company, 348 US 115, 99 L.Ed. 145, 75 S.Ct. 148; Utah Pie Company vs. Continental Baking, 386 US 685, 18 L.Ed.2d 406, 87 S.Ct. 1326 (1967); Atlas Building Products Company vs. Diamond Block, 269 F.2d 950, 10th Cir., cert. den. 363 US 843, 4 L. Ed.2d 1727, 80 S.Ct. 1608.

Once the price discrimination is shown, the Tribune had the burden of proving justification (15 USC 13 (b)) by one of the exceptions stated in 15 USC 13 (a), Utah Pie Co. v. Continental Baking, supra, 386 US at 694.

The Tribune proved no justification. There is no indication in either the District Court or Court of Appeals Opinion that any justification was shown except a finding by the District Court which the

Court of Appeals found to be erroneous.

The District Court's only basis for finding no violation of Robinson-Patman was "I find that the Bismarck Tribune cold (old) in Mandan is not of 'like grade and quality' as the Bismarck Tribune hot (new) in Bismarck. By the same token, I find that the effect of the price discrimination was not "substantially to lessen competition or tend to create a monopoly' within 15 USC 13 (a)." (342 F.Supp. at 1141).

In both of these holdings, the District Court erred, and the Court of Appeals found that it erred. In Note 12 the Court of Appeals specifically found that the lower court applied the "market acceptance" standard, which was rejected by the Supreme Court in Federal Trade Commission vs. Borden Company, 383 US 637, 640-1, 16 L.Ed.2d. 153, 86 S.Ct. 1092, (1966) and that the correct test is that of "physical comparison". The evidence shows that the Bismarck Tribune distributed in Mandan was identical with that distributed in Bismarck at least 29 days out of every 30, the only difference being that occasionally a late news story would be inserted in whichever distribution was printed last. (Appendix 130, 262). By the proper test, therefore, the Tribune in Mandan is "of like grade and quality" with the Tribune in Bismarck and no justification was shown.

The District Court also erred in the quoted finding that "by the same token" the effect of the price discrimination was not to lessen competition or to create a monopoly, and again the Court of Appeals found that it erred. See Note 12, where the Court of Appeals said that the Trial Court required the Pioneer to prove that the discrimination in fact had the prohibited effect, whereas the law only requires that the

plaintiff prove there is a "reasonable possibility" that the price discrimination may have the prohibited effect, citing many cases.

Thus, the Court of Appeals found that the whole basis for the finding by the Trial Court of no violation of Robinson-Patman was erroneous. Irrespective of damages, the lower court should have found the violation to exist under the undisputed facts and the cases cited above, and should have assessed at lease nominal damages, and the Court of Appeals should have reversed for the trial court's failure to do so.

As the matter stands, the Court of Appeals has now made a decision which conflicts with a long line of cases of this Court, including Federal Trade Commission vs. Anheuser-Busch, supra, Moore vs. Mead's Find Bread Company, supra, Utah Pie Company vs. Continental Baking, supra.

II. IN FINDING NO DAMAGES FOR A ROBINSON-PATMAN VIOLATION THE COURT OF APPEALS APPLIED THE WRONG STANDARD AND DISREGARDED AN APPLICABLE DECISION OF THIS COURT.

Since the Court of Appeals concedes that the Trial Court used the wrong test in finding that there was no violation of Robinson-Patman, and since it concedes that the lower court used the wrong test in deciding that the requisite effect on competition was not shown (see discussion above), its conclusion that damages were not proved was based upon "an erroneous interpretation of the standard to be applied" and the Court of Appeals was actually reviewing "a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts". United States vs. Singer Manufacturing

Company, 374 US 174, 193, 10 L.Ed.2d 823, 83 S. Ct. 1773, 1783; U.S. v. U.S. Gypsum Co., 333 U.S. 364, 92 L.Ed. 746, 68 S.Ct. 525.

When the Court of Appeals treated the finding of no damages as a finding of fact, and held that it was not clearly erroneous, it committed grievous error, since the matter is not a question of fact but a question of law, which is not to be judged under the clearly erroneous standard of Rule 52 (a). United States vs. Singer Manufacturing Company, supra.

A strikingly similar case, also involving antitrust violations by a newspaper, where the trial court held that no violation was proved and no damages proved, but the Court of Appeals reversed on grounds we urge here, is Elyria-Lorain Broadcasting Company vs. Lorain Journal Company, 286 F.2d 356, 6th Cir.

III. FOR THE SAME REASONS STATED IN II. ABOVE, THE COURT OF APPEALS ERRED IN FINDING NO DAMAGES PROVED FOR VIOLATIONS OF THE SHERMAN ACT.

The Trial Court found that the Tribune violated the Sherman Act by its "blanketing" of Mandan immediately after the newspaper changed hands. It thereby found all of the requisite elements of a Sherman violation Act to exist. The Court of Appeals affirmed. See pages 4-6 or Opinion.

But the Court then went on to find that no damages had been proved, using the wrong standards as pointed out by the Court of Appeals and as pointed out above, and awarded only nominal damages.

Since it used the wrong standard in determining the issue of damages as to both the Sherman Act and

the Robinson-Patman Act, the decision of the Court of Appeals should be reversed and the case sent back to District Court for a determination of damages as to both Acts.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT'S "IMPLICIT HOLDING" THAT THE ADMITTED PRICE DISCRIMINATION WAS NOT VIOLATIVE OF THE SHERMAN ACT WAS JUSTIFIED BECAUSE "THE PRICING PRACTICE WAS ONE OF OVER THIRTY YEARS STANDING".

This is the entire discussion of the issue stated above contained in the opinion of the Court of Appeals. P. 7 Opinion. It is a total non-sequitur logically. It is bad law. Continuous violation does not legitimate conduct which is illegal.

V. THE DETERMINATION OF THE LOWER COURTS THAT THE PIONEER WAS ENTITLED TO ONLY NOMINAL DAMAGES ON THE SHERMAN ACT VIOLATION AND PROVED NO DAMAGES ON THE ROBINSON-PATMAN ACT COUNT DISREGARDED FACTS CLEARLY PROVED.

The trial court held, using impermissible criteria (see III above) that the Pioneer had not proved damages, because there was evidence of "mismanagement at the Pioneer", and there was "no substantial proof of any damage to circulation, let alone loss of 500 or more subscribers". This conclusion utterly disregards evidence that the circulation of the Pioneer was constantly <u>increasing</u> in Bismarck and everywhere else except Mandan, where the price discrimination occurred. If the Pioneer was mismanaged, how could it increase its circulation everywhere except where the discrimination hit hardest? See Appellant's Brief in Court of Appeals. P. 56-9

Furthermore, the allegation that the circulation figures were unreliable ignores the clear evidence that the books of the Pioneer were thrown open to the Tribune accountants during the trial and they found nothing to complain about.

All of the Pioneer damage figures were based on figures of Mandan circulation, based on original documents produced in evidence or available to Tribune auditors. The criticisms of the trial court of Pioneer circulation figures were based on total circulation figures, not used in the damage computation.

For documentation of the foregoing, see Appellant's Brief in Court of Appeals, pp. 25-30, 65-6, and transcript references therein contained.

The Court of Appeals obviously rubber-stamped a totally unjustified disregard of overwhelming proof of not only the possibility of damages, but actual damage running into many hundreds of thousands of dollars, which should have been found and trebled.

When the Trial Court says there was no proof of a loss of 500 circulation in Mandan, it is just simply wrong. See pp. 25-30, 65-6 Appellant's Brief in Court of Appeals. Even if it had been true, it is not a defense. See Utah Pie Case, supra, 386 U.S. 685, at 699-700.

Dated this 5th day of June, 1974.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NOS. 73-1036, 73-1049

The Morning Pioneer, Inc.

v.

The Bismarck Tribune Company, A Corporation,

Appeal from the United States District Court for the District of North Dakota.

Submitted: September 11, 1973

Filed: March 12, 1974

Before HEANEY, STEPHENSON and WEBSTER, Circuit Judges.

HEANEY, Circuit Judge.

This appeal arises out of a private antitrust suit between the publishers of two daily newspapers in southwestern North Dakota. The Morning Pioneer, Inc., publishes a morning paper, "The Morning Pioneer," in Mandan. Seven miles away in Bismarck, an evening paper, "The Bismarck Tribune," is published by The Bismarck Tribune Company.

[2]

For several years, there was very little competition for circulation or advertising between the newspapers in their respective hometowns.[1] Consequently, the Pioneer's Bismarck circulation was very limited as was the Tribune's Mandan circulation. The papers entered into agreements under which virtually all national and some local advertising was solicited jointly for publication in both papers, and the proceeds were distributed to reflect relative shares of the total circulation--seventy-five percent to the Tribune and twenty-five percent to the Pioneer. In 1963, the management of the Tribune shifted to an aggressive publisher, and a Bismarck family with a printing background--the Conrads--purchased the Pioneer. The previous noncompetitive atmosphere was replaced by aggressive competition. Each paper initiated measures to increase its circulation and advertising in the other's hometown.

In August, 1969, the Pioneer brought this action, seeking damages and injunctive relief. It alleged that the Tribune's practice of selling its carrier-delivered newspapers for a lesser price in Mandan and elsewhere[2] than in Bismarck constituted price discrimination in violation of § 2 (a) of the Clayton Act as amended by the Robinson-Patman Act.[3] It also complained that the

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[1] The opinion of the District Court details the history of the newspapers' ownership and competitive practices. 342 F. Supp. 1138, 1139-1140 (D. N.D.1972).

[2] At trial, the Pioneer limited its claim and proof of damages from price discrimination to that discrimination existing between Bismarck and Mandan.

[3] That section provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:

[3]
Tribune engaged in practices constituting an "attempt to monopolize" as prohibited by §2 of the Sherman Anti-Trust Act[4] by: (1) attempting to purchase the Pioneer; (2) cancelling the joint advertising agreements; (3) hiring Pioneer employees; (4) granting certain advertisers rates more favorable than the published rates to encourage advertising in the Tribune rather than the Pioneer; (5) giving premiums to new subscribers; (6) selling the Tribune for a lesser price in Mandan than in Bismarck; and (7) blanketing Mandan homes with free copies of the Tribune on numerous occasions.

The District Court held that three periods of blanketing had been of sufficient intensity to constitute an "attempt to monopolize" in violation of the Sherman Act, but that the other practices, considered individually or collectively, did not constitute such an attempt. It further held that the Clayton Act had not been violated. It denied injunctive relief but awarded the Pioneer nominal single damages of one dollar (three dollars trebled) and attorney's fees of $7,350, plus costs for the Sherman Act violation.

The Pioneer asserts on this appeal that the District Court erred in: (1) finding that the intensive blanketing during the three periods was the only Sherman Act violation; (2) awarding only nominal damages for this violation; (3) failing to find that the price difference violated the Clayton Act and not awarding damages for that violation. It asks this Court to assess substantial damages for the claimed violations or to remand to the District Court with instructions to it to determine damages for the violations, or to grant a new trial. No request for injunctive relief is made. The

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15 U.S.C. s13 (a) (1970).

[4] Section 2 of the Sherman Act. makes it unlawful to "attempt to monopolize" . . . any part of the trade of commerce among the several states . . ." 15 U.S.C. §2 (1970)

[4]

Tribune, on the other hand, asserts that the District Court erred in: (1) holding that the blanketing violated the Sherman Act; and (2) awarding excessive attorneys' fees for the violation. It asks that the court be affirmed except insofar as it found a violation of the Sherman Act and granted attorneys' fees to the Pioneer. It requests that these fees be disallowed or reduced.

THE SHERMAN ACT VIOLATION

To establish an "attempt to monopolize" in violation of § 2 of the Sherman Act, it is necessary to prove: (1) a specific intent to monopolize; (2) an overt act or acts; and (3) a dangerous probability of monopolization of a specific product market in a particular geographic market. See, Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d 1237, 1240 (8th Cir. 1973); Agrashell, Inc. v. Hammons Products Company, 479 F.2d 269, 284-286 (8th Cir.), cert. denied, 42 U.S.L.W. 3290 and 3291 (Nov. 12, 1973). See also, HIBNER, Attempts to Monopolize: A Concept in Search of Analysis, 34 ABA ANTITRUST L. J. 165 (1967); SMITH, Attempt to Monopolize: Its Elements and Their Definition, 27 GEO. WASH. L. REV. 227 (1959).

The court properly found that each of the necessary elements was present here. The Tribune was the dominant daily newspaper in southwestern North Dakota. If it succeeded in driving the Pioneer out of business, a dangerous probability existed that it would achieve a monopolistic position in the daily newspaper market and would be able to exploit that position to the disadvantage of the people and businesses in the area. The fact that television and radio would continue to compete in the news and advertising field would not prevent the Tribune from exploiting its position as the only daily newspaper because electronic media is not wholly competitive with

[5]

respect to some types of news and advertising.[5] These include: in depth stories on local and national affairs; detailed stories on births, deaths, marriages and social engagements; stock market statistics; detailed sports stories; and price advertising, particularly in the grocery field.

The intent to monopolize was adequately shown by the Tribune's distribution of thousands of free newspapers to Mandan Housing units during April and May and September and October of 1963, and during January through March of 1965.[6] Much of the blanketing during these periods was done on Wednesday, the heavy grocery ad days. It was sometimes accompanied by an appeal to Mandan grocery advertisers to place ads on those days. Because advertising constituted eighty percent of the Pioneer's revenue and a significant portion of that revenue came from grocery advertising, the dangerous probability that the Pioneer would be driven out of business by a continuation of the practice is evident. Accord, Kansas City Star Company v. United States, 240 F.2d 643, 662 (8th Cir.), cert. denied, 354 U.S. 923 (1957). The blanketing condemned by the court clearly exceeded that permissible in furtherance by the court clearly exceeded that permissible in fur-

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[5] See, United States v. Times Mirror Company, 274 F. Supp. 606, 618 (C.D.Cal. 1967), aff'd mem., 390 U.S. 712 (1968); ROBERTS, Antitrust Problems in the Newspaper Industry, 82 HARV. L. REV. 319, 320-322 (1968). See also, United States v. Grinnell Corp., 384 U.S. 563, 572 (1966), where the Supreme Court sanctioned the recognition of submarkets for antitrust purposes.

[6] The blanketing in April and May of 1963 began on the same day as the commencement of the publication of the Pioneer by its new owners, the Conrads. It continued daily for three weeks; and on each day, between 1,600 and 2,000 papers were distributed. The blanketing in September and October was continuous for one week; and for the balance of the two-month period, it was done each week on Wednesday. On most of these days, 1,500 copies of the Tribune were distributed. Finally, during January of 1965, blanketing took place on eight occasions and between 1,000 and 2,400 copies were distributed each day. This was followed by blanketing of similar intensity on eight days in February and on seven days in March of 1965.

[6]

therance of a legitimate attempt by the Tribune to enter the Mandan market and properly served as a basis for the court's implicit finding of an intent to monopolize by the Tribune.

The Pioneer would have us go a step further and find that the District Court erred in failing to find that other acts also were illegal attempts to monopolize. We decline to do so. There is adequate evidence in the record to support the court's findings that: the cancellation of the joint advertising agreement served to terminate an anticompetitive agreement; that the Tribune did not act improperly in hiring former employees of the Pioneer; that the premium giveaway programs engaged in by the Tribune were reasonable and done in accordance with accepted practices in the newspaper industry; and that no improper advertising rate discrimination occurred.

The Pioneer would also have us reverse the court's implicit holding that the Tribune's practice of charging a lower price in Mandan was not violative of the Sherman Act. We reject the invitation. That holding is supported by the evidence demonstrating that the pricing practice was one of over thirty years standing.

Finally, the Pioneer urges that the District Court erred by not viewing all of the acts of the Tribune together in determining whether there was an attempt to monopolize. The Pioneer is correct in asserting that the trier of fact must adopt that approach, see, Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F. 2d 679, 691 (8th Cir. 1966), but the Pioneer is mistaken in its assertion that the court failed to do so. After considering each act individually, the court stated that it was required to view "the evidence as a whole and * * * not tightly compartmentalize the various

[7]

components, and wipe the slate clean after scrutiny of each." It then stated:

> * * * Nevertheless, I find that the conduct of the Bismarck Tribune, whether considered in its separate parts or as a whole, did not constitute an act in restraint of trade. [7] I reiterate that both papers, following March of 1962, responded to the termination of a non-competitive agreement with aggressive, but reasonably competitive conduct, except for the blanketing previously discussed. 342 F.Supp. at 1142.

DAMAGES FOR THE SHERMAN ACT VIOLATION

Any person injured in his business or property by reason of another's violation of the antitrust law may recover treble damages from the wrongdoer. 15 U.S.C. § 15. But it is not enough for recovery of damages to prove that an antitrust law was violated by the defendant. Cf., Duff v. Kansas City Star Company, 299 F.2d 320, 323 (8th Cir. 1962). Rather, the rule is that damages may not be awarded to a litigant unless he also proves "with a fair degree of certainty, the fact of damage and the causal connection between the antitrust violation and the injury." ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS: 1955-1968, at 282 (1968). See, Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 957,958 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960). Cf., Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969); Story Parchment Co. v. Patterson P. Paper Co., 282 U.S. 555 (1931).

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[7] We are convinced that the court misstated when it used the term "restraint of trade" here. We are satisfied that the court meant to use the term "attempt to monopolize," as that was the question before the court.

[8]

The Pioneer's claims for damages for the Sherman Act violation were premised on two factors--loss of advertising revenue and loss of circulation. The District Court found that Pioneer lost one-third of its grocery advertising during a five-week period in 1965, that this was the only advertising loss, and that it was caused by the illegal blanketing in 1965. It declined to award more than nominal damages for the loss because no evidence was introduced to show what the advertising revenue actually was or would have been absent the blanketing. We are satisfied that the court's findings and conclusions with respect to the loss of advertising revenue are supported by substantial evidence. This is not an instance where the defendant's actions prevented a precise computation of the damage. Rather, the fault lies in the plaintiff's failure to introduce any evidence as to the value of its grocery advertisements, normal or actual, during the five-week period. The plaintiff's witness merely related that the loss was one-third of the normal. To have awarded more than nominal damages under these circumstances would have been to engage in impermissible speculation and conjecture. See, e.g., Siegfried v. Kansas City Star Company, 298 F.2d 1, 5-8 (8th Cir.) cert. denied, 369 U.S. 819 (1962).

The court properly declined to award damages for loss of circulation. While there was evidence in the record to support a finding that Pioneer lost three hundred paid subscribers between 1963 and 1964,[8] the court's finding that it was impossible to determine that the loss in subscription was caused by the Tribune's

[8] The court stated that the Pioneer's circulation records were so questionable and unreliable that it would have been improper to find a loss in circulation by relying on them. While this fact precluded the court from estimating the Pioneer's circulation after March 31, 1966, it could have determined the paper's circulaton wth the necessary degree of certainty prior to that date by relying on the reports of the Audit Bureau of Circulations (ABC).

[9]

wrongdoing was not clearly erroneous. The reduction, as the court indicated, could have been caused by one or more of the following facts: (1) the Pioneer was changed from an evening to a morning paper on May 19, 1963; (2) the arrangement between the Pioneer and the Tribune owners of not competing in the other's hometown was also curtailed in 1963; (3) the Pioneer, especially its circulation department, was poorly managed; and (4) the Pioneer's editorial policy was shifted to a more liberal position by the Conrads. The Pioneer made an attempt to prove that these factors did not cause the reduction, but its proof did not satisfy the District Court. We cannot say that the court erred in concluding that the proof of causation was inadequate.

THE CLAYTON ACT ISSUES

The District Court found that for over thirty years, the Tribune, by carrier, was sold for a lower price in Mandan than in Bismarck.[9] It held that this practice did not violate § 2(2) of the Clayton Act for two reasons: (1) The Tribunes delivered in the two cities were not of "like grade and quality" as the Tribune had a lesser

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The ABC report for the nine-month period ending March 31, 1963, shows an adjusted figure for "Carrier and Dealer" circulation of the Pioneer in Mandan to be approximately 2,250 while the same adjusted figure for the twelve-month period ending March 31, 1964, is about 1,925. In reaching these figures, we assumed that the adjustments made were attributable to the "Carrier and Dealer" variation during the years in question. This Mandan reduction of approximately three hundred continued through March 31, 1966, when the Pioneer's last audited report by the ABC was prepared. After that date, the Pioneer terminated its affiliation with the ABC.

[9] The record reveals that during this period, the Mandan price was five cents per week less that the Bismarck price. The practice of charging less for carrier-delivered Tribunes in Mandan ws curtailed on October 26, 1970, but a differential was continued in other communities. Except for the period of September 1967, the price of the Tribune by carrier in Mandan was less than or equal to the price of the Pioneer by carrier in Mandan. The higher Pioneer price in the period of exception resulted from an increase in the Pioneer's price, and the difference was five cents per week.

value to Mandan readers than Bismarck readers. (The court reasoned that the paper arrived later in Bismarck, contained little Mandan news, and less advertising of interest to Mandan readers.) (2) The effect of the price discrimination was not "substantially to lessen competition or tend to create a monopoly."

We need not decide whether the court erred in concluding that the Tribune did not violate §2(a) of the Clayton Act by its price discrimination practice.[10] Even if we resolved all the Clayton Act liability contentions in the Pioneer's favor--i.e., that newspapers are "commodities" subject to the Act,[11] that the Tribunes delivered in Mandan and Bismarck were of "like grade

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[10] The parties agree that "price discrimination" between different purchasers was proven. See, **Federal Trade Com. v. Anheuser-Busch**, 363 U.S. 536, 549 (1960), where the Supreme Court held "a price discrimination within the meaning of [§2 (a)] is merely a price difference." They also agree, as they had stipulated at trial, that the interstate commerce requirements of the antitrust laws were met in this case. While we are satisfied that there was sufficient connection with interstate commerce under the Sherman Act, there is doubt as to whether third commerce requirements of §2 (a) of the Clayton Act, was met--i.e., that "either or any of the purchases involved in such discrimination [were] in commerce." 15 U.S.C. § 13 (a). See, e.g., **STICKELLS, FEDERAL CONTROL OF BUSINESS-ANTITRUST LAWS §126** (1972); ROWE, **Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act**, 67 YALE L. J. 1155, 1166-1168 (1958). See also, **Littlejohn, v. Shell Oil Company**, 483 F. 2d 1140 (5th Cir.) (en banc) cert. denied, 42 U.S.L.W. 3363 (December 12, 1973). Nonetheless, we decline to examine this question any further because it was not raised by the parties and its resolution either way would not affect our disposition of the appeal.

[11] The term "commodity" is not defined in the Act, but it is generally thought to include only tangible items of commerce and not services. See, **Tri-State Broadcasting Co. v. United Press Internat'l, inc.**, 369 F. 2d 268, 270 n. 2 (5th Cir. 1966). See also, STICKELLS,FEDERAL CONTROL OF BUSINESS-ANTITRUST LAWS §126, at 449-450 (1972); ROWE, **Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act**, 67 YALE L. J., supra at 1163-1165. We recognize that the production of a newspaper requires and incorporates the services of a great number of people, but the fact remains that when finally published, the paper takes on a tangible form and it is bought and sold in the market place. As such, it is predominantly a tangible good and, thus, a "commodity" subject to the Act.

[11]

and quality"[12] and that the price discrimination had the prohibited effect on competition[13]--a reversal and remand of this case to the District Court would be unnecessary. This is true because the Pioneer failed to prove that it was injured by the Tribune's price discrimination.

The basic injury alleged to have been caused by the price discrimination was a loss in the Pioneer's Mandan circulation, and proof that this loss was caused by the price discrimination was properly found by the District Court to be wholly inadequate.[14] We also note that the price discrimination complained of was terminated in October 1970, and there is no showing or contention that it is likely to be reinstituted.

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[12] In reaching its decision as to "like grade and quality," the court appears to have applied the "market acceptance" standard. while that standard is not without support among the commentators, see, e.g., CASSADY & GRETHER, **The Proper Interpretation of "like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act**, 30 S. Cal. L. REV. 241 (1957), it was rejected by the Supreme Court in **Federal Trade Com. v. Borden Co.** 383 U.S. 637, 640-641 (1966). There. the Court indicated the proper test is that of "physical comparison."

[13] The court appears to have required that the Pioneer prove the Tribune's price discrimination in fact had the prohibited effect on competition. Such a burden is not required under the statute. It is only necessary for the plaintiff to prove there is a **"reasonable possibility"** that the price discrimination may have the prohibited effect on competition. **Federal Trade Com. v. Morton Salt Co.**, 334 U.S. 37, 47 (1948). See, **Utah Pie Co. v. Continental Baking Co.**, 385 U.S. 685, 701 (1967); **Atlas Building Prod Co. v. Diamond Black & Gravel Co.**, 269 F. 2d 950, 957 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960). **But see, Federal Trade Com. v. Morton Salt Co.**, supra at 55-61 (Jackson & Frankfurter, J.J. dissenting) and **Moog Industries v. Federal Trade Commission**, 238 F. 2d 43, 61 (8th Cir. 1956), where the standard of **"reasonable probability"** was advanced.

[14] The theory that the price discrimination caused the loss in the Pioneer's Mandan circulation is weakened by the evidence showing that the Tribune's Mandan circulation remained stable after it terminated the price differential in October of 1970. The ABC's report for the twelve-month period ending March 31, 1970, reveals that the Tribune's Mandan "Carrier and Dealer" circulation was then 1,811, while the ABC's report for the twelve-month period ending March 31, 1971, shows the circulation increased to 1,895.

[12]

ATTORNEYS' FEES

The award of attorneys' fees to successful plaintiffs is sanctioned by 15 U.S.C. §15. Where no factual error is claimed, the amount assessed by the District Court must stand unless the party seeking review establishes that the court has abused its discretion. Armco Steel Corporation v. State of North Dakota, 376 F.2d 206 212 (8th Cir. 1967). When the damages recovered are relatively small, as is the case here, it is not necessarily an abuse of discretion to grant attorneys' fees in excess of the damage award. Advance Business Systems & Supply Co. v. SCM Corporation, 415 F2d 55, 70 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970). In arriving at the fee, the court considered the proper factors,[15] and we find no abuse of discretion here.

We deny the Pioneer's request for attorneys' fees on this appeal.

Each party will bear its own costs on this appeal.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[15] The court indicated it was considering the following factors in determining the award of attorneys' fees: (1) the fact that plaintiff's counsel had not had the benefit of a prior judgment or decree in a case brought by the government; (2) the standing at the bar of counsel on both sides; (3) the time spent by plaintiff's counsel; (4) the magnitude and complexity of the litigation; (5) the responsibility undertaken by counsel; (6) the amount recovered; and (7) the court's knowledge of the quality of counsel's work done on the case in and out of court. **See generally,** Comment, **Attorneys' Fees in Individual and Class Action Antitrust Litigation,** 60 CALIF. L. REV. 1656 (1972).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-1841

The Morning Pioneer, Inc.,

Petitioner

-vs-

The Bismarck Tribune Company,
A Corporation,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DANIEL J. CHAPMAN
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Attorney for Respondent

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, in The Morning Pioneer, Inc. v. The Bismarck Tribune Company, a Corporation, its No. 73-1036, is copied in the Appendix of the Petition for Writ of Certiorari.

The opinion of the Trial Court in Civil No. 996 can be found at 342 F. Supp. 1138 (1972).

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was filed March 12, 1974, affirming the decision of the lower court.

Petitioners claim jurisdiction in the Supreme Court based upon 28 USC 1254, subd. 1.

QUESTIONS FOR REVIEW
(As set forth by Petitioner)

I. In finding no Robinson-Patman Act violation the Court of Appeals and the Trial Court decided an important Federal question in conflict with applicable decisions of the Supreme Court.

II. In finding no damages for a Robinson-Patman Act violation the Court of Appeals applied the wrong standard and disregarded an applicable decision of this Court.

III. For the same reasons stated in II. above, the Court of Appeals erred in finding no damages proved for violations of the Sherman Act.

IV. The Court of Appeals erred in holding that the trial court's "implicit holding" that the admitted price discrimination was not violative of the Sherman Act was justified because "the pricing practice was one of over thirty years standing".

V. The determination of the lower courts that the Pioneer was entitled to only nominal damages on the Sherman Act violation and proved no damages on the Robinson-Patman Act count disregarded facts clearly proved.

STATUTES INVOLVED
(Set forth in full in Petition for Writ of Certiorari)

STATEMENT OF THE CASE

This is an action brought by the Morning Pioneer, a morning newspaper of Mandan, North Dakota, against the Bismarck Tribune, an evening paper published in Bismarck, North Dakota. The two towns are about 5 or 6 miles apart, Bismarck being considerably larger than Mandan and the Tribune being the dominant paper in the area.

The Pioneer alleges that the Tribune was guilty of violations of the Robinson-Patman Act and the Sherman Act. The allegation of a Robinson-Patman violation is based on the fact that historically and until 1970, the Tribune had sold by carrier 5¢ cheaper per week in Mandan than it did in Bismarck. This price differential preceded the Robinson-Patman Act and was the apparent result of a management conclusion that the Tribune in Mandan had a lesser value than it did in Bismarck.

This conclusion appears to be founded upon the fact that the Tribune did not have the Mandan legal publications (it is in another county), had no local news and was printed earlier than the Bismarck edition, thus occasionally missing late-breaking stories. Notwithstanding this fact, there was only one brief period when the Tribune by carrier was cheaper than was the Pioneer by carrier and that came about by an increase in the Pioneer rate, not a decrease in the Tribune rate. For much of the time in question, the Tribune cost more by carrier in Mandan than did the Pioneer by carrier, irrespective of the fact that there may have been a price differential between the Tribune in the two towns.

The alleged Sherman Act violations were several in number but each one failed of proof and the District Court so found, except with regard to a practice called blanketing, whereby a number of free samples by the Tribune were placed in Mandan for the stated purpose (by the Tribune) that it was an attempt to build up circulation. The District Court found this to be heavy-handed and a Sherman Act violation, for which damages in the amount of $1.00 were assessed.

Both the Trial Court and the Appellate Court found that the proof of damages on the part of the Pioneer was totally inadequate. The Court of Appeals held, in effect, that conceding virtually all of what the Pioneer argues on the issue of fault, there still could not be a reversal because of the failure of proof on the matter of damages. That court suggested that mismanagement and unreliable records might be a better explanation of the Pioneer's woes.

Petitioner seeks to invoke the jurisdiction of this Court because this decision constitutes a reversal of previous decisions to the effect that a

price discrimination under Robinson-Patman is a price difference, and thus constitutes a prima facie case. Such a statement indicates a misunderstanding of the prior decisions (they do not hold that a price difference is in and of itself a violation of the Act) and of the decision of the Court of Appeals (it does not hold that there was no Robinson-Patman violation but does hold that even if there was, there are no damages and thus there is no reason for reversal).

Nor would this case in any way violate the rule of United States v. Singer, 374 U.S. 174, 10 L. Ed.2d 823, 83 S.Ct. 1773, which holds that where the facts are undisputed, the conclusions derived therefrom are conclusions of law, not subject to the clearly erroneous rule. In this case the facts are very much in dispute and the Trial Court and the Appellate Court in finding no damages proven is making a finding of fact elicited from a vast amount of conflicting facts.

ARGUMENT

I. IN FINDING NO ROBINSON-PATMAN ACT VIOLATION, THE COURT OF APPEALS AND THE TRIAL COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

Petitioner incorrectly asserts that the Court of Appeals failed to find a Robinson-Patman Act violation. What the Court of Appeals said was that, assuming arguendo all of the disputed issues were resolved in favor of the petitioner and there was a violation, nevertheless it would still be unnecessary to remand the case for the reason that "The Pioneer failed to prove that it was injured by the Tribune's price discrimination". (See Court of Appeals decision set forth at page 11 of Appendix A or page 25 of the Petition for Writ of Certiorari.)

In making such a finding, the Court of Appeals was giving petitioner more than it was entitled to as it ignored some significant issues in arriving at this assumptive conclusion. Thus, the Court of Appeals seemed to find that a newspaper is a commodity, such as a can of beer, as distinguished from a service, such as a television news service. (See Note 11 of the opinion of the Court of Appeals.)

And the Circuit Court adopted the petitioner's argument that the Trial Court had used the "market acceptance" standard as distinguished from the physical comparison standard. (See Note 12 of the opinion of the Court of Appeals.) Actually what the Trial Court found was that the newspaper in Mandan was not the same as the one in Bismarck for the reason that late breaking news often did not make the Mandan edition. Moreover, the physical comparison standard is inapplicable to a

newspaper as there is a difference between it and a can of evaporated milk as in Federal Trade Comm. v. Borden Co., 383 U.S. 637. Whereas a can of evaporated milk may be the same, be it labelled under one brand or another, the newspaper is uniquely different, depending upon the area in which it is to be sold. Thus, while a local newspaper may have one value in its immediate area because of its local news, legal publications and advertisements, it will not have that same value in another area. If it is of any value at all, beyond its immediate vicinity, it will be for entirely different reasons, such as its editorials, features or comics. It may be thought that this violates the rule against the "market acceptance" doctrine. To the contrary, it may be that neither the "market acceptance" doctrine nor the "physical comparison" doctrine applies to newspapers. In the case of newspapers, the local paper is uniquely valuable where sold and this has nothing to do with "market acceptance" but goes to its real value.

Further, the Court of Appeals declared in its footnotes (see Note 13) that the Trial Court failed to utilize the "reasonable probability" standard in arriving at its conclusion that the price discrimination did not have the prohibited effect on competition. Actually the Trial Court concluded that the "effect of the price discrimination was not substantially to lessen competition or tend to create a monopoly within 15 USC 13 (a)." In other words the Trial Court went beyond the "reasonable probability" standard and declared that it did not have that effect.

Petitioner, in its petition for a writ of certiorari, reassumes a stance which it urged at the trial and circuit levels to the effect that by merely showing a territorial price difference, its prima facie case is made and a burden is cast upon the respondent to justify by showing one of the exceptions noted in 15 USC 13 (a). Cited is Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536, 4 L. Ed.2d 1385, 80 S. Ct. 1267. The stance completely ignores what the Supreme Court said in that case, which was to the effect that the holding was very narrowly limited to the meaning of the word "discrimination" in the phrase "price discrimination".

The court carefully points out the narrowness of its decision by saying, at page 553 that there are other elements of a Section 2 (a) violation that were not considered by the court in its decision, among these being that there was insufficient injury to competition.

However much, then, that petitioner may have benefitted by a ruling or rulings that were erroneously misconstrued in its favor, the fact remains that the Circuit Court's decision is founded upon a finding that forecloses the right of the petitioner to seek review in this court, which is that the proof of damages from the alleged violation is wholly inadequate.

Unless, then the court wishes to reverse this finding and consider whether the evidence is sufficient to show an injury resulting from the Robinson-Patman Act violation, this petition should be denied.

II. IN FINDING NO DAMAGES FOR A ROBINSON-PATMAN VIOLATION THE COURT OF APPEALS APPLIED THE WRONG STANDARD AND DISREGARDED AN APPLICABLE DECISION OF THIS COURT.

Petitioner is mistaken in arguing that the Trial Court's finding of no damages was a conclusion of law, based upon an erroneous interpretation of the standard to be applied. Both the Trial Court and the Court of Appeals, reviewing the action of the Trial Court, concluded that the showing of damages was inadequate. The Circuit Court said, in fact:

> "To have awarded more than nominal damages under these circumstances would have been to engage in impermissible speculation and conjecture." (See Appendix A, page 8 or Petition for Writ, page 22)

The two allegations of damage by the petitioner were that (1) advertising revenue was lost; and (2) circulation was caused to be reduced. As to the first, no evidence was introduced as to what the advertising revenue was or would have been absent the blanketing. And, as to the second, the trial court concluded, a conclusion joined in by the Court of Appeals, that it was impossible to determine that if there was a drop in circulation, it was caused by the Tribune's wrongdoing.

The alleged application of the wrong standard does not deal with the matter of damages but in the determination that there had been a violation. Insofar as damages are concerned, the petitioner does not suggest what "wrong test" was used.

Petitioner cites United States v. Singer Manufacturing Company, 374 U.S. 174, 10 L.Ed 2d 823, 83 S. Ct. 1773, as support for its position, quoting from that case to the effect that it was a question of law as to whether the District Court "applied the proper standard to essentially undisputed facts". Arguing further, petitioner says that the Court of Appeals erred in finding as a matter of fact that no damages had been proven since this is a question of law, not to be judged under the clearly erroneous standard of Rule 52 (a).

What the Supreme Court said in the Singer case was that where the facts are essentially undisputed, it is wrong to treat the issue as one of fact but it is an issue of law. In the case before the court, for which certiorari is hereby sought, the facts are disputed in every respect. The Pioneer sought to show first of all that it had a drop in circulation after the new owners assumed control but the facts show that the so-called drop in circulation may have resulted from a switch-over to mail deliveries or from a culling out process of free samples previously given to officials, such as policemen or it could have been entirely illusory because the Pioneer records were so unreliable.

Assuming a drop in circulation, the next question is the reason for this drop. Was it, as the Circuit Court asked, because of the switch-over to morning delivery in an area that has always known only evening delivery? Was it because of the increase in the cost of the Pioneer which occurred shortly after the new publishers took over? Was it because of a switch in editorial emphasis from conservative to liberal? Was it because of resentment engendered by the purchase of the Mandan paper by Bismarck-based owners?

The Pioneer sought to argue that the only reason for the slight drop in circulation was the price difference in the Tribune in Mandan, when at almost all times the local Mandan paper could be purchased by carrier for less money than the cost of the Tribune.

It is clear that the rule in the Singer case is inapplicable.

In like manner, Elyria-Lorain Broadcasting Company v. Lorain Journal Company, 298 F.2d 356, 6th Cir., is clearly distinguishable. That was a case in which the factual situation was undisputed and, yet, the District Court had determined, by a finding labelled as a conclusion of law, that no damages had been shown.

The Court of Appeals said that findings of fact labelled as conclusions of law could be set aside under the clearly erroneous rule. It further found that there was ample evidence of the anti-trust violation and of the damages. Thus, contrary to what petitioner urges in its petition for certiorari, the Court of Appeals in that case acted under the "clearly erroneous" rule of 52 (a).

We have no such case before the court in this case. The facts were vigorously disputed and the District Court and the Court of Appeals both found that the Pioneer failed to prove the fact of injury and failed to prove any damages.

III. THE COURT OF APPEALS ERRED IN FINDING NO DAMAGES PROVIDED FOR VIOLATIONS OF THE SHERMAN ACT.

Petitioner makes essentially the same assertion in connection with damages under the Sherman Act as under Robinson-Patman. In like manner respondent points out that petitioner does not show wherein the Trial Court or the Court of Appeals used a wrong standard insofar as damages are concerned.

The finding of both courts is clear. No damages of any nature were proven which would be sufficient upon which an award of damages could be made. Whether or not either court used a wrong standard in determining that damages were recoverable is irrelevant.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT'S "IMPLICIT HOLDING" THAT THE ADMITTED PRICE DISCRIMINATION WAS NOT VIOLATIVE OF THE SHERMAN ACT WAS JUSTIFIED BECAUSE "THE

PRICING PRACTICE WAS ONE OF OVER THIRTY YEARS STANDING".

Petitioner asserts that continuous conduct does not legitimate conduct which is illegal. Since intent is a key determination in a Sherman Act violation, it could hardly be said that there could have been an intent to monopolize when at the inception of the practice there was no law prohibiting it. Kansas City Star. Co. v. United States, 240 F.2d 643, cert. denied 354 U.S. 923.

Nevertheless, in any event, the Trial Court and the Circuit Court determined that there was a Sherman Act violation. The additional instance of violation of the act would have no effect upon the conclusion that, even conceding a violation, no damages were proven.

V. THE DETERMINATION OF THE LOWER COURTS THAT THE PIONEER WAS ENTITLED TO ONLY NOMINAL DAMAGES ON THE SHERMAN ACT VIOLATION AND PROVED NO DAMAGES ON THE ROBINSON-PATMAN ACT COUNT DISREGARDED FACTS CLEARLY PROVED.

Petitioner makes an unwarranted assumption that any facts were "clearly proved". Everyone, except the Pioneer, agrees that the subscription figures used by the Pioneer from time to time were unreliable.

The Pioneer admits that on taking over the control of the newspaper, a large number of free subscriptions were removed, the total of which is unknown, and there was a large switch on the part of several hundred persons to local mail delivery. In 1967, things were so bad that figures could not be obtained even from the Pioneer's own records upon which to base an estimate of circulation. (Petitioner's Exhibit 50.)

Yet, even accepting the Pioneer's figures as substantiated, its conclusion based thereupon, that the Tribune's activities caused the reduction in Mandan when the circulation was increasing elsewhere fails when it is recalled that the so-called price discrimination existed everywhere else, except in Bismarck. Had the price differential been the determining factor, there should have been a loss elsewhere and there was none.

Petitioner's assertion that the books of the Pioneer were thrown open to Tribune accountants and they found nothing to complain about is also unwarranted by the evidence. More accurately, the Tribune accountants found nothing in conformance with sound business practices and thus could make no conclusions from what they found.

The Trial Court found and the Court of Appeals agreed with the Trial Court that there was no evidence of a loss of 500 subscribers in Mandan. This, petitioner says, is simply untrue. The difference in these results is that petitioner would wish that the Trial Court would accept its unrealistic and unsubstantiated proof and the Trial Court chose not to do

so. Since it is clear that the clearly erroneous standard applies, it would seem unlikely that certiorari would be granted merely to review a disputed record of facts.

Dated this 27th day of June, 1974.

Respectfully submitted,

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